

a RE HAROUN AL-RASHID BIN MOHD YUSOF EX-PARTE: DAYA LEASING SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM

DATO' FAIZA TAMBY CHIK J

b [BANKRUPTCY NO. D29-1351-90]

12 FEBRUARY 1996

c ***BANKRUPTCY:** Validity of proceedings - Bankruptcy notice - Whether based on two separate judgments - Creditor's petition - Whether to be sufficiently particularised - Verification - Failure to annex affidavit of truth of statement of petition - Whether fatal - Bankruptcy Act 1967 ss. 6(1), 131, 133 - Bankruptcy Rules 1969 rr. 91(2), 106.*

d ***BANKRUPTCY:** Bankruptcy proceedings - Whether quasi-penal in nature - Provisions of the Bankruptcy Act and Rules - Whether to be strictly adhered to - Section 6(1) of Bankruptcy Act 1967 and r. 106 Bankruptcy Rules 1969 - Verification of creditor's petition - Whether mandatory provisions.*

e The appellant was issued with a bankruptcy notice and a creditor's petition dated 13 October 1990 and 29 January 1991 respectively. By the said bankruptcy notice the appellant was ordered to pay Daya Leasing Sdn. Bhd. some RM42,135.08 "*being the amount due on a final Judgment and Order obtained by Daya leasing Sdn. Bhd. in the Magistrate's Court, Kuala Lumpur in Summons No. 82-7514-87 on 28 June 1988 and 27 July 1988 respectively*". It was not in dispute that the Order of 27 July 1991, though
f given separately, was in respect of costs which the Court had decreed by the earlier judgment of 28 June 1988. In this appeal against the order of the learned Deputy Registrar dismissing the appellant's application to set the two processes aside, the appellant argued that the bankruptcy notice was issued pursuant to two separate judgments, and therefore, was invalid, having contravened Rule 91(2) of the Bankruptcy Rules 1969. The facts also showed that upon service
g of the said creditor's petition on the appellant, no Affidavit of Truth of Statement of Petition was annexed thereto to verify the same. Hence, it was further argued that such failure to verify had likewise rendered the creditor's petition fatally defective.

h **Held:**

i **[1]** It is clear from the terms of the relevant judgment, order and notice that there is only one final judgment dated 28 June 1988. The order dated 27 July is in respect of costs which is the decree of the Court itself on 28 June 1988 ordering costs to be paid. In respect of the order for costs therefore, the effective judgment is the decree of the Court on 28 June 1988 itself, not the order dated 27 July 1988 quantifying their amount.

- [2] Notwithstanding s. 131 of the Bankruptcy Act, bankruptcy proceedings are almost quasi-penal in nature, and so creditors who claim the benefit of the Bankruptcy Act must strictly adhere to its provisions and rules. A creditor's petition should therefore fulfill the statutory requirements of the Bankruptcy Act and unless this is done the Court should be very chary of curing deficiencies in it. a
- [3] The creditor's petition here did not exactly identify the designated person who signed it. It merely shows an illegible signature of someone. In view of s. 133(a) of the Bankruptcy Act 1967, and the absence of evidence to show that the said non-designated person was lawfully authorised by the judgment creditor to sign the petition, the petitioner should come to the hearing with proof of the authority. The petition, therefore, is defective on this ground. b
- [4] Section 6(1) of the Bankruptcy Act 1967 and Rule 106 of the Bankruptcy Rules 1969 clearly require verification, by affidavit, and with sufficient particularity, of the creditor's petition. These are mandatory provisions and therefore, any failure to abide by them cannot be taken as mere irregularities that can be cured under s. 131. In the circumstances, the failure to annex the Affidavit of Truth of Statement of Petition to the creditor's petition having contravened the aforesaid mandatory provisions, and having also caused substantial injustice to the appellant, cannot be taken as, and is not, a curable defect. c

[Appeal allowed]

Cases referred to:

Ooi Thean Chuan v. Banque Nationale De Paris [1992] 2 CLJ 1225 (foll) d

Re Chen Chong Fatt Willy Ex Parte Hitachi Lease (Singapore) Pte. Ltd. [1987] 1 MLJ 94 (refd) e

Legislation referred to:

Bankruptcy Rules 1969, rr. 91(2), 106 f

Bankruptcy Act 1967, rr. 6(1), 131 g

Subordinate Court Rules 1980, O. 26A

Other source referred to:

William's Law and Practice in Bankruptcy, Muir Hunder B.A., 17 Edn., p. 523 h

For the appellant - Wan Mohd. Zam b. Wan Embong; M/s. Prasad Abraham & Assoc.

For the respondent - P.C. Choong; M/s. Choong & Co. i

a

JUDGMENT

Faiza Tamby Chik J:*b*

The notice of appeal in encl. 23 is an appeal by the appellant against the decision of the learned Deputy Registrar who dismissed the application of the appellant dated 1 September 1993 in Encl. 15 which sought to set aside and/or to strike out the bankruptcy notice dated 13 October 1990 and the creditor's petition dated 29 January 1991. The affidavits in support thereof are in encls. 14, 15, 17, 18, 19, 19A, 20, 22A, 21A and 21B.

c

The grounds of appeal of the appellant are as follows:

d

(a) the bankruptcy notice is invalid/void because it is issued based upon two judgments which is prohibited by the Bankruptcy Act.

(b) the creditor's petition was not executed by an authorised person under seal of the respondent corporation/petitioner and thus is null and void as well.

e

(c) in any event Liew Wai Li, the alleged signatory of the creditor's petition was at all material time not properly authorised by the respondent corporation to execute and to authorise the issuance of the creditor's petition.

f

(d) upon service of the creditor's petition, the affidavit of truth of statement of petition was not annexed to the creditor's petition.

(e) the creditor's petition did not take into account of the part payment of the sum involved and there is an admission by the petitioner to withdraw the creditor's petition.

(a) The Bankruptcy Notice

g

The bankruptcy notice is in Encl. 3. It states unequivocally that the appellant/judgment debtor "must pay to Daya Leasing Sdn. Bhd. (the petitioner) ... the sum of RM42,135.08 cents as being the amount due on a final judgment and order obtained by Daya Leasing Sdn. Bhd. against you (the appellant) in the Magistrate's Court at Kuala Lumpur in Summons No. 82-7514-87 on 28 June 1988 and 27 July 1988 respectively ..." (see encl. 19 Exhibits LWL2 and LWL3).

h

Rule 91(2) of the Bankruptcy Rules 1969 reads as follows: "A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.". In the case of *Re Chen Chong Fatt Willy Ex Parte Hitachi Lease (Singapore) Pte. Ltd.* [1987] I MLJ 94 it was held that a bankruptcy petition cannot be founded on two

i

separate judgments even though it may be obtained in the same suit ... Execution on these two judgments would have to be levied separately".

In the instant case it is submitted by the judgment creditor that there is only on final judgment dated 28 June 1988 which was granted pursuant to an application for summary judgment under O. 26A of the Subordinate Court Rules 1980 (see Exhibit "LWL2" of Encl. 19) And the order dated 29 July (see Exhibit "LWL3" of encl. 19) it is further submitted, is not a final order because it was an order for a given sum payable by the judgment debtor after assessment of costs as provided for in the final judgment dated 28 June 1988.

The order in terms of the summary judgment dated on 28 June 1988 reads as follows:

It is this day adjudged that the abovenamed 2nd (the appellant) and 3rd defendant do jointly and severally pay the abovenamed plaintiff the sum of Ringgit Twenty Three Thousand Nine Hundred and Ninety And Sen Sixty only (RM23,990.60) together with interest on the sum of Ringgit Twenty Three Thousand Two Hundred And Fifty Six only (RM23,256) at the rate of 2% per month from 12 November 1986 to the date hereof and thereafter at the rate of 8% per annum to the date of realisation and costs of this action including all such fees, expenses, charges and costs (including the abovenamed plaintiff's solicitors' fees on a solicitor-client basis) that may be incurred by the abovenamed plaintiff in recovering all sums owing to it under the lease agreement as may be assessed by this Honourable Court.

The terms of the order dated 27 July 1988 are as follows:

This action on 28 June 1988 having been called on for Hearing before His Honour, Amdan bin Mat Din, Magistrate, Magistrate's Court, Kuala Lumpur in the presence of Mr. P.C. Choong of Counsel for the abovenamed plaintiff and in the absence of the abovenamed 2nd and 3rd defendants, **Whereby it was adjudged *inter alia*** that the abovenamed 2nd and 3rd defendants do pay to the abovenamed plaintiff all such fees, expenses, charges and costs (including the plaintiff's solicitors' fees on a solicitor-client basis) that may be incurred by the plaintiff in recovering all sums owing to it under the lease agreement as may be assessed by this Honourable Court **and** the assessment coming on for Hearing this 27 July 1988 before Her Honour, Puan Zakiah Kassim, Magistrate, Magistrate's Court, Kuala Lumpur **It is hereby ordered** that the abovenamed 2nd and 3rd defendants do jointly and severally pay to the abovenamed plaintiff the sum of Ringgit Four Thousand Eight Hundred only (RM4,800) together with interest thereon calculated at the rate of 8% per annum from 27 July 1988 to the date of realisation.

The bankruptcy notice dated 13 October 1990 against the appellant was in the following terms:

Bankruptcy Notice

Haroun Al-Rashid B. Mohd Yusof
(NRIC No. 0587149)
Lot 369, Jalan 13½
Jalan Cheras

- a** Kajang
43000 Selangor.
- Take notice that within seven (7) days after service of this notice on you, excluding the day of such service, you must pay to Daya Leasing Sdn. Bhd. of 3rd Floor, Wisma 'M', No. 66, Jalan Ampang, 50450 Kuala Lumpur, the sum of
- b** RM42,135.08 as being the amount due on a final judgment and order obtained by Daya Leasing Sdn. Bhd. against you in the Magistrate's Court at Kuala Lumpur in Summons No. 82-7514-87 on 28 June 1988 and 27 July 1988 respectively whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of this Court, or you must satisfy this Court that you have a counter-claim, set-off or cross-demand against
- c** the said Daya leasing Sdn. Bhd. which equals or exceeds the sum claimed by them and which you could not set up in the action in which the judgment was obtained.

Particulars

- | | | |
|----------|--|--|
| d | 1. Amount due <i>vide</i> judgment dated 28 June 1990 ... | RM23,990.60 |
| | 2. Interest on the sum of RM23,256 calculated at the rate of 2% per month from 12 November 1986 to 28 June 1988 (594 days) ... | RM9,083.22 |
| e | 3. Interest on the sum of RM23,256 calculated at the rate of 8% per annum from 29 June 1988 to 12 October 1990 (836 days) ... | RM4,261.26 |
| | and | |
| f | 4. Costs ... | <u>RM 4,800.00</u>
<u>RM42,135.08</u> |

Dated 13 October 1990.

- It is apparent from the terms of the abovementioned judgment, order and notice that there is only one final judgment dated 28 June 1988. The order dated
- g** 27 July 1988 is in respect of costs which is the decree of the Court itself on 28 June 1988 ordering costs to be paid and the order dated 27 July 1988 merely ordering the appellant to pay this decreed costs together with interest thereon calculated at the rate of 8% per annum from 27 July 1988 to the date of realisation. Therefore it is clear in the case of costs the effective
- h** judgment is the decree of the Court on 28 June 1988 itself, not the order dated 27 July 1988 quantifying their amount.

(b) Whether or not the creditor's petition is defective

- In the creditor's petition (Encl. 7) on p. 2 it is not shown the designation of the purported person who signed the creditor's petition. It merely shows an illegible signature of someone. Section 133(a) Bankruptcy Act 1967 states that
- i** a corporation may act by any of its officers authorised in that behalf under

the seal of the corporation. In order words where a limited company like the petitioner acts the better way is for one director of the company and the secretary to act in their own names, stating that they are such officers of the company duly authorised under seal. In this case there is only an illegible signature of someone without a designation and further there is no evidence in the petition that this non-designated person who signed the petition was lawfully authorised by the judgment creditor to sign the petition. The petitioner should be prepared at the hearing with proof of the authority (see *William's Law and Practice in Bankruptcy* 17 Edn., By Muir Hunder B.A. p. 523). Therefore the creditor's petition in this case is defective on this ground.

(c) The alleged authority of Liew Wai Li

It is contended by the petitioner that the person who signed the petition was Liew Wai Li who was authorised to do so by the petitioner. However it is noted from Exhibit "LWL4" in Encl. 19 the purported letter of authority was issued by another entity, C.I. Holdings Berhad and not the petitioner. Again it is to be noted from the same exhibit that the extract of minutes of the board held on 1 September 1984 was signed by one Chan Chun Keong as secretary. However the petitioner admitted in his affidavit dated 18 January 1984 in para. 6 Exhibit "LWL7" "particulars of secretaries for 1987 to 27 March 1993" that Chan Chun Keong was only a secretary on 27 March 1993. As a consequence of this incontrovertible fact it is reasonable to conclude that Chan Chun Keong could not have signed the minutes of the board on 1 September 1984. Thus the aforesaid minutes dated 1 September 1984 is suspect.

(d) The affidavit of truth of statement of petitioner

The petitioner admitted in para. 27 of their affidavit dated 6 September 1993 in Encl. 19 that there is no obligation on their part to serve the Affidavit of Truth of Statement of Petition on the judgment debtor. Section 6(1) of the Bankruptcy Act 1967 and r. 106 of the Bankruptcy Rules 1969 require the verification by affidavit with sufficient particularity of the creditor's petition and the aforesaid petition must be annexed or tied to or bound to or affixed to or stapled to the verifying affidavit so as to avoid any dispute as to what exactly is being verified (see *Ooi Thean Chuan v. Banque Nationale De Paris* [1992] 2 CLJ 1225.)

It must also be emphasised here that as bankruptcy proceedings are almost quasi-penal in nature, creditors who claim the benefit of the Bankruptcy Act must strictly adhere to its provisions and rules.

Also there is the question of whether I should regard the shortcomings of the petition in this case as a formal defect or an irregularity which should be cured by the Court in its discretion under s. 131 of the Bankruptcy Act 1967 which states, "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to

- a* the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.”

- b* I am of the opinion that a creditor’s petition should fulfil the statutory requirements of the Bankruptcy Act and unless this is done the Court should be very chary of curing deficiencies in it by exercising its discretionary power of waiving them. In the instant case I am of the view that s. 6(1) of the Bankruptcy Act 1967 and r. 106 of the Bankruptcy Rules 1969 are mandatory provisions and therefore any failure to abide by them cannot be taken as mere irregularities that can be cured. In this case a substantial injustice has been
- c* caused to the appellant by the shortcomings of the petition whereby a verification by affidavit with sufficient particularity is found wanting.

(e) Part payment and withdrawal

- d* In para. 6 of the affidavit dated 7 September 1993 in Encl. 19A the petitioner admitted that payment in the sums of RM21,067.53 cents and RM8,000 (being agreed costs) by a third party, i.e. one Mr. Ann Wan Tiam, thereby leaving a balance in the sum of RM21,067.54 cents were made on or around 23 August 1991, and an application to annul and rescind the said receiving order was made and granted on 9 December 1991 without any objection by the
- e* petitioner. Further in the same aforesaid affidavit the petitioner in Exhibit “CPC1” promised that provided the two aforesaid payments were made, the petitioner would not institute a fresh bankruptcy action against the appellant for the original amount since the amount of the indebtedness would have been reduced.

- f* I cannot agree with contention of the appellant on this matter because it is apparent from the bankruptcy notice dated 13 October 1990 itself that the judgment creditor has in fact instituted a fresh bankruptcy action against the appellant based on the reduced amount (see “Particulars in the bankruptcy notice” hereinbefore mentioned).
- g*

For the abovementioned reasons I allow the appeal dated 14 July 1994 in Encl. 23 with costs.

Reported by W.A. Sharif

h

i